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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re Marriage of DAVID and JOANNIE FISCHER.	
DAVID FISCHER, Respondent, v. JOANNIE FISCHER, Appellant.	A160179 (San Mateo County Super. Ct. No. FAM0127015)

Joannie Fischer appeals from the denial of her request for attorney fees and costs as the prevailing party on the unsuccessful application of her former husband, David Fischer, for a protective order under the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6344).[1] The question we must decide is whether Joannie's request was barred by attorney fee provisions in a settlement and stipulated judgment in the parties' dissolution action. As we will explain, we agree with Joannie that the evidence does not support the trial court's conclusion that the parties' agreement regarding use of community property funds for

[1] Further statutory references will be to the Family Code unless otherwise specified. Following the custom in family law cases, we shall refer to the parties by their first names.

attorney fees in the dissolution action precluded Joannie's attorney fees request under the DVPA. Accordingly, we reverse.

BACKGROUND

Following a 15-year marriage, David filed for divorce on October 20, 2014. A year later, prior to commencement of trial, David sought a restraining order against Joannie under the DVPA. After a two-day evidentiary hearing, Commissioner Rachel Holt found Joannie's conduct did not constitute "abuse" within the meaning of the DVPA and denied David's request for a five-year protective order. David filed both a petition for a writ of mandate to reverse that ruling and an appeal; we denied the petition (*Fischer v. Superior Court* (Sept. 6, 2016, A148551)) and, on March 23, 2018, issued an opinion on the appeal affirming denial of the protective order. (*Fischer v. Fischer* (Mar. 23, 2018, A148482) [nonpub. opn.].)

While the appeal was pending, trial of the dissolution action commenced before Judge Susan L. Greenberg. On the first day of trial, the case settled and the terms of the settlement were orally recited for the record. This unwritten settlement evolved into a stipulated judgment of dissolution negotiated by the parties and approved by the court four months later. The settlement and stipulated judgment specifically addressed the parties' respective responsibility for payment of attorney fees, providing for payment of the parties' attorney fees prior to settlement with community property funds and for each party to pay his or her own attorney fees from separate property after that date.

Subsequently, after we decided David's appeal in the DVPA action in Joannie's favor, Joannie filed a request for prevailing party attorney fees and costs pursuant to section 6344, seeking reimbursement of the fees and costs she incurred in defending against David's unsuccessful attempts to obtain the

restraining order. The trial court denied the request, finding it barred by the parties' settlement.

Confusingly, the question whether Joannie is eligible for an award of or attorney fees under section 6344 was not addressed during the original DVPA proceedings, because the rulings in Joannie's favor were promptly challenged by David; Joannie's request for fees and costs was filed only after we had decided David's appeal. When the DVPA matter returned to the trial court, Judge Sean P. Dabel was called upon to interpret the settlement supervised by Judge Greenberg and stipulated judgment she approved. Thus, the right to seek prevailing party fees in the DVPA proceeding, which never settled, turns on a provision of a settlement effectuated in a dissolution that bars each party from seeking reimbursement for community property funds used by the other to pay pre-settlement legal fees and requires each party to pay his or her own legal fees after the settlement date. The question in this appeal is whether this provision applies to the DVPA proceeding, as well as the dissolution, so as to bar Joannie from seeking prevailing party fees she would otherwise be entitled to request under section 6344.

After considering extrinsic evidence—namely, the terms of the initial unwritten settlement agreement read into the record at the dissolution trial and unspecified "discussions on the record"—Judge Dabel determined that the fee provisions of the stipulated judgment prohibited Joannie from recouping the fees and costs she incurred in defending against David's domestic violence claims with prevailing party fees under section 6344. Having scoured the record for substantial evidence the parties intended that result, and finding none, we are compelled to reverse the ruling.

We commence our opinion with a description of the prior DVPA proceedings because they provide the context in which the attorney fee issue subsequently arose in the dissolution action.

I.

As explained in our 2018 opinion affirming denial of David's DPVA claim, the altercation at its center occurred immediately after Joannie learned from answering David's phone that he was continuing an affair with a woman he had promised never to see again. After David "yanked the phone out of her hands," she "pushed" or "hit" him, because she "had just lost it" and "hadn't calmed down yet." David then called 911, but quickly hung up. The 911 operator called back and asked to speak to Joannie, who told her she had just discovered her husband was having an affair and "slapped" and pushed" or "hit" him" "in response to discovering his ongoing infidelity and deception." Joannie told the operator: "It's going to be fine. There's no problems or violence." After David told the operator Joannie had "done things to him," the operator called the police. Deciding Joannie was the primary aggressor, the police arrested her and asked David if he would like an emergency protective order; he said he did not. After picking Joannie up at the county jail, David drove her to a previously planned party, where they and other family members celebrated Joannie's birthday. When the party ended, David invited the entire family to spend the night at his home. (*Fischer v. Fischer*, *supra*, A148482.)

The district attorney declined to prosecute and charges against Joannie were dropped.

Three days later, December 30, 2015, after talking to his lawyer, David filed a request for a five-year DVPA protective order against Joannie. The request also reserved David's right to seek a child custody modification pursuant to section 3044, which creates "a rebuttable presumption that an award of sole or

joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child."

David requested a five-year "Domestic Violence Restraining Order, stay-away, no contact, and dwelling exclusions order." He also alleged Joannie had a "history of anger, mental health issues, and physical violence" and requested she be directed to participate in a year-long "Batterer Intervention Program and/or Anger Management Course." At the hearing on these requests, both parties testified, David called four other witnesses and Joannie called two. As we have said, the court concluded that Joannie had not committed any acts that could reasonably be deemed "abusive" within the meaning of the DVPA and denied David's request for a protective order,[2] and we rejected David's challenges to the court's ruling.[3] The attorney fee issue later presented in the dissolution action was not raised in the DVPA proceeding.

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[2] The court noted that "no criminal case was filed," David "did not request the Emergency Protective Order at the time of the alleged incident," "bailed [Joannie] of custody," "went to [her] home," "celebrated her birthday with her and the children," and "then spent the night with her and the children at [his home.]" The court observed that "[t]his case strikes the court as being, quite frankly, a singular incident, though it's clear that this relationship had been perhaps unhealthy for quite some time, and there was some inappropriate, perhaps immature, behavior going both ways."

[3] Our opinion affirming the ruling against David noted that he was " 'a six-foot-one, 185-pound husband who physically pushed five-foot-five, 130-pound Joannie around when he was angry. [Citations.] He admitted as much. [Citation.] David has also admitted that he has spat on Joannie when he got mad. During another fight, he doused her with water. [Citation.] David acknowledges physically grabbing and moving Joannie "three to five times." [Citation.] This includes an incident when David violently tossed Joannie across a bed. [Citation.]' " (Fns. omitted.)

II.

The marital dissolution proceedings presented a variety of financial issues relating to the division of community property and child and spousal support; child custody was not at issue. The parties simultaneously filed lengthy trial briefs addressing these issues. The entire reference to attorney fees in Joannie's 42-page brief is as follows: "Joannie is requesting attorney's fees related to her defense of David's failed attempt to get a restraining order, for her defense against David's failed Writ of Mandate [*sic*], and for fees and costs related to the date of separation and support issues. Joannie specifically requests that at the first day of the trial, the court make an order for the submission of attorney fee declarations after the court rules on the issues before the court at this trial."[4] Presumably because the DVPA appeal was still pending, Joannie had not formally moved for an award of fees in that proceeding.

David's brief requested that Joannie be ordered to pay his legal expenses in the DVPA proceeding as a sanction under section 271 for insisting on an evidentiary hearing. David acknowledged Joannie had prevailed in the DVPA proceeding, but maintained this result was a "grievous miscarriage of justice" that was being appealed. David further stated, "as of the date of separation, Joannie will have in excess of $57 million, of which $43 million will be investible assets, and therefore she will have no need for a contribution to her attorneys' fees. Except for attorneys' fees and costs associated with the domestic violence action, each party should pay his/her own attorney fees and costs, as each has more than sufficient funds from which to do so."

The dissolution trial began on February 2, 2017, with a morning session spent on legal arguments related to a dispute over the parties' date of separation.

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[4] The first of these two sentences is also included in the introduction section of Joannie's brief.

At the outset of the afternoon session, one of David's attorneys, Ellen Stross, told the court, "the parties have reached a settlement of all issues, which I would like to read onto the record." After describing all of the other issues resolved by the settlement, Stross turned to the issue of attorney fees, stating as follows:

"Regarding the issue of attorneys' fees, the parties have, from the inception of [this] case through today, paid for their attorneys' fees using community property funds. The parties agree not to ask each other for reimbursements for whatever funds were paid for attorneys' fees through today [i.e., February 2, 2017]. And, obviously, the parties haven't received their statement for attorneys' fees through today. But such as they are, fees through today [are] washed. The parties waive reimbursements related to the amounts that they've spent on attorneys' fees to date. Going forward, starting tomorrow, the parties will each pay their own attorneys' fees."

The court clarified with counsel that under the agreement fees for legal services rendered through February 2, 2017, would be paid with community property funds even if payment of such fees was made after that date.

After counsel completed her recitation of the terms of the court-supervised settlement, which had not yet been memorialized in writing, the court asked each party whether he or she understood "what was read onto the record today," and admonished each of them that they were waiving the right to challenge the settled issues "because in reaching this settlement you waive your right to trial on the issues that were disputed and before the court?" The parties affirmed for the record their mutual understanding that "by entering into this agreement you're waiving right to appeal the terms of this agreement" and knowledge that "if this case was fully litigated that the outcome could have been different. . . ." Based on these acknowledgments by the parties, the court declared that "the

stipulation as recited by counsel, agreed to by each of the parties, will become the order of the court forthwith."

When the court inquired "[w]ho's volunteering to prepare all this?"—presumably referring to the need to put the terms of the settlement recited for the record in writing—Stross volunteered.

About four months later, on June 13, 2017, the parties executed the stipulated judgment of dissolution that evolved from the negotiated settlement agreement previously read into the record. The stipulated judgment was filed on June 26, 2017. The judgment states that "[t]he court [i.e., Judge Greenberg] has reviewed and hereby approves the Judgment and Dissolution of Marriage dated 6/13/2017 ('Agreement'). The Agreement shall be deemed incorporated in full as an operative part of this Judgment, and the parties are ordered to comply with all of the executory terms of the Agreement. [¶] However, the Agreement shall be confidential."

The portion of the confidential stipulated judgment of dissolution relating to fees and costs was not made a part of the record on appeal, but the parties agree it provides as follows:

"The parties acknowledge that they have paid their attorneys' fees from the inception of this case using community property funds. Except as otherwise expressly provided in this Judgment, the parties shall pay from community property their respective attorneys' fees, court costs, appraisal and accounting fees, and other expenses incurred throughout and including February 2, 2017. Both parties waive any right to claim reimbursement for the use by the other of community property funds for payment of attorneys' fees and/or costs incurred through and including February 2, 2017. Each party shall bear and pay his or her own attorneys' fees, court costs, appraisal and accounting fees, and other expenses incurred in this matter on or after February 3, 2017."

After our opinion establishing Joannie as the prevailing party in the DVPA proceeding issued on March 23, 2018, Joannie filed a formal motion for prevailing party fees under section 6344. The motion was accompanied by a memorandum of costs in the amount of $1,680.60 together with a request for $337,236 in attorney fees paid counsel to defend against the protective order requested by David,[5] plus an additional $5,000 in fees she anticipated would result from the hearing on the amount of attorney fees she sought.

III.

The scope of judicial review of an interpretation of a written instrument, such as the stipulated judgment, was set forth in the seminal opinion in *Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861. Chief Justice Traynor's opinion for a unanimous court rejected the proposition that an appellate court is compelled to accept "any reasonable interpretation of a written instrument adopted by a trial court whether or not extrinsic evidence has been introduced to interpret the instrument and whether or not that evidence, if any, is in conflict."

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[5] The request for fees observed that "[t]his was not a 'typical' domestic violence restraining order case. In this case, the parties were in the middle of a contentious custody dispute and the issue of spousal support was pending when David filed his Request for DVRO [domestic violence restraining order] in which he made false allegations on Joannie's history of abuse. . . . [¶] Joannie's fees incurred were necessary and reasonable in light of the severity of David's false allegations. The potential impact of David's allegations could have resulted in an order compromising his children's best interests, and an inequitable award of support, not to mention the hurdles Joannie would face having domestic violence protection order on her record. David's costly campaign against Joannie seems to have been motivated, at least in part, by his desire to gain an advantage in custody and spousal support."

Joannie's request for fees describes in detail the work undertaken in connection with a lengthy deposition, prolonged statement of decision process, David's petition for a writ of mandate, and his appeal.

(*Id.* at p. 865.) As *Parsons* explains, "[t]he interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretations so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, 'an appellate court is not bound by a construction of a contract based solely on the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].' [Citations.]" (*Id.* at p. 865.)

In this case, the extrinsic evidence, unopposed below and properly considered by the trial court, does not conflict. We are therefore not bound by the trial court's construction of the stipulated judgment and must make an independent assessment of its meaning. (*Parsons v. Bristol Development Co., supra*. 62 Cal.2d at pp. 865–866; *City of Hope National Medical Center v. Genentech, Inc*. (2008) 43 Cal.4th 375, 395; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913.)

IV.

As will be seen, the extrinsic evidence considered by the trial court does not support, but rather undermines the trial court's interpretation of the stipulated judgment. The unwritten settlement recited for the record never mentioned the DVPA proceeding, which is unsurprising because that matter was unresolved at the time and in fact never settled. The "discussions on the record" Judge Dabel

found "would have" taken the DVPA proceeding into account were not identified in his order. Assuming the reference is to discussions at the time the settlement was placed on the record, Judge Dabel was not personally involved, because the settlement negotiations took place during litigation of the dissolution case and were supervised by Judge Greenberg. More importantly, the transcript of the hearing at which the settlement was placed on the record reflects no discussions bearing on whether the settlement included attorney fees for the DVPA matter.

At the hearing on Joannie's fee motion, the parties indicated they had *not* discussed including DVPA fees in the settlement. Joannie's attorney told Judge Dabel that the parties settled "fees for the divorce case," but "did not settle anything on the DVPA matter. We specifically asked them to do that, and "they said no, and the matter was up for appeal at that time." Counsel for David went further, emphatically denying *any* specific discussion of settling the DVPA fees: "I don't know what [Joannie's counsel] is talking about when he says we discussed DVPA fees separately, or that the court considered the DV fees or any discussion of it. None of that is in the transcript. He has no evidence of it. He cites to nothing for it because it never happened, Your Honor."

Judge Dabel's reliance on unspecified "discussions on the record" indicating the parties "would have taken account" of the fee issue in the DVPA case in the stipulated judgment of dissolution is thus both puzzling and unjustified. Judge Dabel appears to have accepted David's view that DVPA attorney fees were subject to the fee provisions in the dissolution settlement agreement because they were not expressly excluded from it, but that view is not supported by anything in the court-supervised settlement agreement read into the record, on-the-record discussions at the time, or stipulated judgment. In contrast, Joannie's view that the attorney fees

provision in the stipulated judgment refers only to fees in the dissolution, as opposed to the DVPA matter, is supported by both the terms of the agreement and the on-the-record settlement.

According to David, the crucial provisions of the stipulated judgment regarding fees are that all attorney fees "from the inception of this case" through February 2, 2017, are to be paid with community property and "[e]ach party shall bear and pay his or her own attorneys' fees . . . and other expenses incurred in this matter on or after February 3, 2017." As David sees it, these provisions constitute a waiver of the right to seek prevailing party fees, an award of which would require him to reimburse Joannie for the expenses she incurred in the DVPA proceedings.

Joannie disagrees. With respect to pre-settlement fees, based on the provision in the stipulated judgment that both parties "waive any right to claim reimbursement for the use *by the other* of community property funds" for legal expenses, Joannie argues she waived only her right to seek reimbursement for *David's* use of community property to pay legal expenses, not her right to reimbursement of her own expenses. As to postsettlement expenses, she maintains it is not inconsistent for a litigant to pay his or her own legal fees and remain entitled to statutory relief that may be available, depending upon the outcome of the matter.

We agree with Joannie.

" 'A waiver is the relinquishment of a known right. "A waiver may occur (1) by an intentional relinquishment or (2) as 'the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.' [Citation.]" ' " (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.) David does not claim Joannie intentionally relinquished her right to seek prevailing party fees under

section 6344. Instead, he implies that, in the circumstances of this case, her assertion of the right to invoke that statute is so inconsistent with the settlement agreement that she must be deemed to have relinquished it. But it does not seem to us inconsistent for a party who agrees to pay her own fees, or to have both parties' fees paid from community property, to assert the right to seek statutorily authorized reimbursement of her expenses in the event she ultimately prevails. Section 6344 authorizes the trial court in a DVPA proceeding to provide financial relief to the prevailing party. It was not the purpose of the stipulated judgment of dissolution to protect the losing plaintiff from having to pay fees and costs incurred by the defendant as a result of the plaintiff's commencement and maintenance of the DVPA proceeding.

The language in the stipulated judgment that each party "shall bear and pay his or her own attorney fees' . . . and other expenses incurred *in this matter* on or after February 3, 2017" (italics added), which David emphasizes, appears in a sentence that simply distinguishes the source of payments before and after settlement of the dissolution action: Before settlement of the dissolution action, the parties paid their attorney fees and related costs out of community funds; afterwards, that practice is impermissible. Joannie never challenged this distinction. David assumes "this matter" necessarily includes the DVPA action because he filed his request for a protective order in the existing dissolution case. But the request for a protective order triggered a distinct proceeding under the DVPA that resulted in an immediately appealable order. The appeal was being briefed at the time of the settlement and the matter never settled. In our view, it is far more reasonable to view "this matter" in the stipulated judgment as referring to the dissolution itself.

The express waiver in the stipulated judgment also serves the purpose of specifying the precise date at which the parties must cease using community

property funds to pay their legal fees and related expenses. But the wording of the waiver is significant. As Joannie points out, the waiver expressly refers to the parties' right to claim reimbursement "for the use *by the other* of community property funds" for legal expenses. This language, which was drafted in the months following the on-the-record settlement agreement, is more specific than was the oral recitation. The recitation on the record, after acknowledging the parties had thus far ("from the inception of the case") paid their attorney fees with community property funds (as the written agreement also acknowledges), stated that the parties "agree not to ask each other for reimbursements for whatever funds were paid for attorneys' fees through today. . . . [F]ees through today are washed."

The negotiated, written language—parties have no right to reimbursement for community property used by "the other" party—is consistent with the orally stated agreement that the parties would not "ask each other" for reimbursement of community property spent for legal expenses. Both refer to the parties' mutual agreement to use community property funds to pay the legal fees of both parties. Neither the stipulated judgment nor the court supervised settlement agreement addresses a party's right to recoup his or her own legal expenses pursuant to statutory authorization.

David sees Joannie's trial brief in the dissolution as evidence that the parties "entered into a global stipulation" resolving the DVPA fees issue in that the brief requested attorney fees and costs related to the DVPA matter (as well as fees and costs related to the issues in the dissolution litigation). David reasons that Joannie made DVPA fees an issue for trial and therefore the issue was necessarily included in the settlement that eliminated the need for trial. But the conclusion does not follow from the premise. Nothing in the record indicates the parties ever mutually contemplated a "global stipulation" that

included settlement of the fee issue under the DVPA. As earlier pointed out, the parties did not settle the DVPA matter, and counsel for the parties both represented to the trial court that there was no separate discussion of fees in the DVPA matter. With the parties in the midst of briefing the appeal at the time of settlement, it is impossible to imagine that no reference would have been made to it on the record or in the written agreement if a "global settlement" including DVPA attorney fees had been achieved by settlement of the dissolution case.[6]

David's position, in the trial court and on this appeal, seems based on the proposition that, even if not made explicit, surrender of the right to seek fees and costs potentially reimbursable by statute is necessarily implicit or inherent in an agreement to allow the use of community property funds for both spouses' attorney fees and costs or to pay one's own legal expenses. But we are aware of no legal authority for this proposition.

The explanation in Judge Dabel's order for denying Joannie's motion for prevailing party fees[7] states in its entirety: "The court is persuaded that the Court Supervised Settlement Agreement, Stipulated Judgment and discussions on the record would have taken into account the Appeal filed by [David]

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[6] As part of an argument that denial of Joannie's request for prevailing party fees is justified by her "waiver of past and future fees and costs," David asserts that "[w]hen the parties agreed, the appeal was pending, so neither of them knew who might be the prevailing party and whether any fees would be awarded to that party under section 6344. Rather than taking that risk, the parties settled past and future fees as part of a comprehensive financial settlement in which Joannie received $65 million." Relying on *Patton v. Patton* (1948) 32 Cal.2d 520, David argues that an agreement between spouses waiving future fees and costs in a dissolution action is enforceable (subject to contract defenses), and the trial court therefore properly denied Joannie's request for prevailing party fees under section 6344. *Patton* is of no apparent relevance, as Joannie does not contest the validity of the parties' settlement agreement, only its proper interpretation.

[7] The order also denied David's motion for section 271 sanctions.

concerning his denied application for a Domestic Violence [Restraining] Order. As such a subsequent request for a prevailing party fee award must fail."

This order is no more than a conclusion based on a highly questionable assumption. The order does not say the court-supervised settlement agreement, stipulated judgment, and "discussions on the record" *took* David's appeal into account when negotiating the fee provisions of the judgment of dissolution, and there is no evidence they did. Nor is there any evidence in the record to support the assumption that the documents and discussions "would have taken" David's appeal into account.

V.

David argues that Joannie should be precluded from raising on appeal what he sees as a "new theory" of recovery—her argument that the parties' agreement precluded her from seeking reimbursement for community property used by David in the DVPA proceedings, but did not preclude her seeking reimbursement (by means of a prevailing party fees motion) for her own use of community property funds in those proceedings. David asserts that this argument, which he characterizes as acknowledging that the written agreement includes a "partial waiver of DVPA fees," is a change of position from Joannie's argument below that the judgment in the dissolution was "of no consequence" because it did not " 'settle anything on the DVPA matter' " and could not have done so because the DVPA proceeding was a " 'separate action' " from the dissolution.

The argument David challenges is less a new argument than an illustration of Joannie's underlying point that the attorney fees provision in the settlement controlled the parties' rights vis-à-vis each other with regard to community property funds used for legal expenses in the dissolution and not the parties' independent statutory rights under the DVPA. The waiver in the

stipulated judgment described a mutual forfeiture of each party's right to reimbursement of his or her share of community property funds used by the other to pay legal fees. It did not reach the right of the prevailing party in the DVPA matter to seek attorney fees and thereby recoup his or her own legal expenses in that matter. The arguments advanced by Joannie in the superior court are entirely consistent with her fundamental position here: that the dissolution settlement is of no consequence to her entitlement to prevailing party attorney fees in the DVPA proceeding.

DISPOSITION

Denial of Joannie's motion for an award of fees and costs under section 6344 is reversed. The matter is remanded to the trial court for reconsideration of the motion in a manner consistent with this opinion.

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Kline, J.*

We concur:

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Richman, Acting P.J.

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Miller, J.

In re Marriage of David and Joannie Fischer (A160179)

*Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.